

No. 10,940

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

KOA GORA,

Appellant,

VS.

TERRITORY OF HAWAII,

Appellee.

**Upon Appeal from the Supreme Court
of the Territory of Hawaii.**

TERRITORY'S ANSWERING BRIEF

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Index

	PAGES
Statement of Facts	1- 4
Summary of Argument	4- 7
Argument	8-32
<p>The charge upon which Appellant was tried in the First Circuit Court of Hawaii is not disclosed by the record. The only semblance of a charge in the record is what Appellant alleges was the district court charge. Appellant alleges that this charge is contained in the District Magistrate's Notice and Certificate of Appeal. Arguendo, the latter was sufficient against attack for the first time upon appeal.</p>	
1. The Purported Charge Is Attacked Now As An Afterthought	8- 9
2. Objections Not Presented In The Trial Court Are Not Reviewable Upon Appeal	9-10
3. The Record Fails To Disclose The Nature Of The Charge Of Which Appellant Was Convicted	10-12
4. Arguendo, The Purported Charge Of The District Court Was Sufficient	12-28
5. The Lascivious Conduct Does Not Have To Be Public Under The Hawaiian Statute	28-32
Conclusion	33
Appendix	35-37

Table of Authorities Cited

Cases	PAGES
Borden v. State (Okla. 1927) 252 Pac. 446.....	26
Cannon v. United States, 29 L. Ed. 561, 116 U.S. 55.....	17
Coates v. United States (C.C.A. 9th) 59 Fed. (2nd) 173.....	5, 15
Commonwealth v. Wardell, 128 Mass. 52, 35 Amer. Rep. 357	7, 29
Connell v. State (Ind.) 19 N.E. (2nd) 267.....	28
Equitable Life Ass. Co. v. Brown, 187 U.S. 308, 47 L. Ed. 190	6, 12
Fukunaga v. Territory (C.C.A. 9th) 33 Fed. (2nd) 397.....	6, 11
Glover v. State, 179 Ind. 459, 101 N.E. 629.....	27, 28
Johnson v. United States (C.C.A. 9th) 59 Fed. (2nd) 42	
certiorari denied 53 S. Ct. 83, 287 U.S. 631, 77 L. Ed. 547	5, 15
Muench v. United States (C.C.A. 8th) 96 Fed. (2nd) 332....	5, 9
People v. Carey (Mich.) 187 N.W. 261.....	7, 18, 19, 20
People v. Kratz, 230 Mich. 334, 203 N.W. 114.....	7, 24
People v. Ring, (Mich.) 255 N.W. 373.....	7, 23
Republic of Hawaii v. Kanalo, 11 Haw. 435	12
Republic of Hawaii v. Parsons, 10 Haw. 601	17
Rex v. Gillingham, 2 Haw. 750.....	17
State v. Burgess, (Maine) 123 A. 178	7, 22
State v. Juneau (Wis.) 24 L.R.A. 857.....	7, 30
State v. Langelier (Maine) 8 A. (2nd) 897	26
State v. Millard, 18 Vt. 574, 46 Amer. Dec. 170.....	7, 23, 31
State v. Schumacher (Iowa '23) 191 N.W. 870	7, 25
State v. Vliet (N.J.) 197 A. 894	7, 26
Territory v. Burum, 34 Haw. 75.....	12
Territory v. Chee Siu, 25 Haw. 814	28
Territory v. Chong, 36 Haw. 537	5, 9
Territory v. Sing Kee, 14 Haw. 586	12, 13
Territory v. Yoon, 36 Haw. 550	5, 9
Territory v. Yoshimura, 35 Haw. 324.....	19
Tong Kai v. Territory, 15 Haw. 612.....	5, 9
Statutes	
Revised Laws of Hawaii 1945, Section 10819.....	5, 10
Revised Laws of Hawaii 1945, Section 11673.....	7, 21
Revised Laws of Hawaii 1945, Section 11681.....	28

Other References

27 American Jurisprudence, title Indictments & Informations, 664, Section 103	7, 19
33 American Jurisprudence, title Lewdness, 16, Section 2.....	7, 30
24 C.J.S., title Criminal Law, 275, Section 1671	5, 8
24 C.J.S., title Criminal Law, 350, Section 1690	5, 9
42 C.J.S., title Indictments & Informations, 1344, Section 312	5, 15
31 Corpus Juris, title Indictments & Informations, 718, Section 268, Note 33.....	7, 22
8 Ruling Case Law, 347, 348, 380, Section 380.....	7, 21, 30

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TERRITORY'S ANSWERING BRIEF

STATEMENT OF FACTS

The Appellee deems it necessary to make the following statement in order that the Court may have a clearer picture of what transpired at the trial.

Information had been received by the United States Navy Shore Patrol as well as the Vice Division of the Honolulu Police Department, from soldiers, sailors and neighbors, regarding the "sex character" of the Appellant. Also information had been received that Appellant was selling liquor without a license (Rec. pp. 13 and 16). [Due to the large concentration of both Army and Navy personnel in Honolulu, and adjacent Pearl Harbor, both of these offenses are always pressing problems with the local authorities.]

Arthur A. Notikai of the United States Navy Shore Patrol (Rec. p. 9) and Sergeant Frank Shaner of the Vice Division of the Honolulu Police Department (Rec. pp. 15-16) acting in coordination as undercover agents, were detailed to conduct an investigation (Rec. pp. 10 and 15-16). The Appellant maintained a rooming house in Honolulu (Rec. pp. 13 and 19). The Shore Patrol had a list of "bona fide" rooming houses and hotels where sailors could stay over night. The Appellant's place was not on this list (Rec. p. 13).

At 10:30 A.M. on July 6, 1943, Notikai, with marked money, (Rec. p. 10) called at the Appellant's rooming house. He inquired if he could obtain a room and whether Appellant had any women (Rec. p. 11). Appellant replied that "he didn't have any women" and did not "need any"—that he could "take their place"—that Notikai could "sleep" with him (Rec. p. 11).

Notikai was taken to a room having a shower. The Appellant entered this shower, took off his short pants and washed himself. During all this time he asked Notikai "to come in the shower and look at him" (Rec. p. 11).

When Appellant came out of the shower he went over to Notikai and unbuttoned the latter's trousers and took hold of his private parts. Notikai pushed him away. He inquired if Appellant "had anything to drink" (Rec. pp. 11-12). Appellant replied that he would let Notikai have a pint. For this one pint of liquor Appellant charged and received the sum of ten dollars (Rec. p. 12).

[Under the laws of the Territory of Hawaii, since December 7, 1941, bottled intoxicating liquors are sold to civilians on the ration system. Service men are not sold bottled intoxicating liquors anywhere in the Territory of Hawaii. Consequently with the scarcity of liquors and the large number of service men in Hawaii, certain unscrupulous individuals illegally sell their ration of liquor for exorbitant prices. Thus in the present case the Appellant charged ten dollars for the one pint of liquor.]

In the meantime, Sergeant Shaner was waiting outside. When he saw Notikai coming out of the Appellant's rooming house with a bottle, he entered the place and questioned the Appellant. The latter admitted to Sergeant Shaner that he had sold the liquor to Notikai for ten dollars. The Appellant reached in his right pocket and produced the ten dollars in marked money which he had obtained in payment of the liquor (Rec. p. 16). The Appellant was placed under arrest and subsequently was charged by the police with two offenses, to-wit, lewd and lascivious conduct and selling liquor without a license. Both of these offenses are misdemeanors under the laws of the Territory of Hawaii.

When Appellant took the stand he denied selling the liquor. He claimed that he had offered Notikai a drink and the latter had taken the entire bottle (Rec. p. 21). The Appellant claimed that the ten dollars which Officer Shaner found on him was money paid by Notikai for the rental of a room (Rec. pp. 21-22).

Inferentially the Appellant also denied the lascivious conduct (Rec. p. 23).

The Appellant was initially tried in the District Court of Honolulu and was found guilty as charged (Rec. pp. 49-52). Thereafter Appellant appealed to the Circuit Court of the Territory of Hawaii. There the Appellant was again found guilty as charged (Rec. p. 48).

An appeal was taken to the Supreme Court of the Territory of Hawaii by Appellant. In a unanimous decision handed down on September 14, 1944, the judgment of conviction was affirmed (Rec. pp. 30 and 38).

The Appellant has now appealed his conviction of these misdemeanors to this Court.

SUMMARY OF ARGUMENT

THE CHARGE UPON WHICH APPELLANT WAS TRIED IN THE FIRST CIRCUIT COURT OF HAWAII IS NOT DISCLOSED BY THE RECORD. THE ONLY SEMBLANCE OF A CHARGE IN THE RECORD IS WHAT APPELLANT ALLEGES WAS THE DISTRICT COURT CHARGE. APPELLANT ALLEGES THAT THIS CHARGE IS CONTAINED IN THE DISTRICT MAGISTRATE'S NOTICE AND CERTIFICATE OF APPEAL. ARGUENDO, THE LATTER WAS SUFFICIENT AGAINST ATTACK FOR THE FIRST TIME UPON APPEAL.

1. The Purported Charge Is Attacked Now As An Afterthought.

Appellant had two trials in the courts below. During those two trials the sufficiency of the charge was not questioned. Upon appeal, however, Appellant claims, for the first time, that he was entitled to more information to prepare his defense. When a defendant has been accorded a fair trial and the charge against him is attacked for the first time upon appeal as an

afterthought, the charge will ordinarily be held sufficient as against a claim that it is "vague" or "indefinite."

Muench v. United States (C.C.A. 8th) 96 Fed. (2nd) 332 at 335

Coates v. United States (C.C.A. 9th) 59 Fed. (2nd) 173 at 174

Johnson v. United States (C.C.A. 9th) 59 Fed. (2nd) 42 at 44, certiorari denied 53 S. Ct. 83, 287 U.S. 631, 77 L. Ed. 547

24 C.J.S., title Criminal Law, 275, Sec. 1671

42 C.J.S., title Indictments & Informations, 1344, Sec. 312

2. Objections Not Presented In The Trial Court Are Not Reviewable Upon Appeal.

No objection was ever made to the charge against Appellant until his appeal. Under the laws and decisions of the Territory of Hawaii objections not raised until after verdict are deemed waived.

Tong Kai v. Territory, 15 Haw. 612 at 613

Territory v. Chong, 36 Haw. 537 at 540

Territory v. Yoon, 36 Haw. 550 at 552

Revised Laws of Hawaii 1945, Section 10819

Moreover, exceptions cannot be taken for the first time upon appeal.

24 C.J.S., title Criminal Law, 350, Sec. 1690

3. The Record Fails To Disclose The Nature Of The Charge Of Which Appellant Was Convicted.

Appellant seeks to challenge the sufficiency of the charge of which he was convicted. But his record upon

appeal is incomplete. It fails to show the precise charge of which he was convicted. Undoubtedly this is due to the fact that the charge was attacked for the first time upon appeal as an afterthought. The Supreme Court of Hawaii found the record before it incomplete. A fortiori, the record before this Court is also incomplete.

The record of the charge being thus wholly incomplete the sufficiency of such charge is therefore moot.

Fukunaga v. Territory, (C.C.A. 9th) 33 Fed. (2nd) 397

Equitable Life Ass. Co. v. Brown, 187 U.S. 308, 311, 47 L. Ed. 190, 192

4. **Arguendo, The Purported Charge Of The District Court Was Sufficient.**

The Appellant adopts the theory that the charge against him is contained in a portion of the "Notice and Certificate of Appeal" of the District Magistrate. Assuming the foregoing for the purpose of argument, however, even that purported charge is sufficient as against attack for the first time upon appeal. All of the essential elements were set forth in the charge. It was wholly unnecessary to particularize or give any of the details of the offense. The gross indecency of the subject forbids it.

Neither is it necessary for the statute to define the meaning of the word "lascivious." The word has a meaning which is well understood both in the courts and in the community. Therefore statutes do not attempt to define it.

People v. Carey, (Mich.) 187 N.W. 261 at 262

State v. Burgess, (Maine) 123 A. 178

People v. Ring, (Mich.) 255 N.W. 373 at 375

State v. Millard, 18 Vt. 574, 46 Amer. Dec. 170

People v. Kratz, 230 Mich. 334, 203 N.W. 114

State v. Schumacher (Iowa '23) 191 N.W. 870

State v. Vliet (N.J.) 197 A. 894 at 895

27 Amer. Jur., title Indictments & Informations, 664, Sec. 103

8 Ruling Case Law, 347, Sec. 380

31 Corpus Juris, title Indictments & Informations, 718, Sec. 268, Note 33

5. **The Lascivious Conduct Does Not Have To Be Public Under The Hawaiian Statute.**

Revised Laws of Hawaii 1945, Sec. 11673

Commonwealth v. Wardell, 128 Mass. 52, 35 Amer. Rep. 357

State v. Juneau (Wis.) 24 L.R.A. 857

State v. Millard, *supra*, 18 Vt. 574, 48 Amer. Dec. 170

8 Ruling Case Law, 348, Sec. 380

33 Amer. Juris., title Lewdness, 16, Sec. 2

ARGUMENT

THE CHARGE UPON WHICH APPELLANT WAS TRIED IN THE FIRST CIRCUIT COURT OF HAWAII IS NOT DISCLOSED BY THE RECORD. THE ONLY SEMBLANCE OF A CHARGE IN THE RECORD IS WHAT APPELLANT ALLEGES WAS THE DISTRICT COURT CHARGE. APPELLANT ALLEGES THAT THIS CHARGE IS CONTAINED IN THE DISTRICT MAGISTRATE'S NOTICE AND CERTIFICATE OF APPEAL. ARGUENDO, THE LATTER WAS SUFFICIENT AGAINST ATTACK FOR THE FIRST TIME UPON APPEAL.

The Appellant had two trials in the courts below upon the issue of his guilt of the misdemeanors of which he was convicted. During those two trials, first in the District Court of Honolulu and thereafter in the First Circuit Court of Hawaii, the sufficiency of the charge against the Appellant was not questioned or even mentioned.

1. The Purported Charge Is Attacked Now As An Afterthought.

The sufficiency of the charge was attacked for the first time upon appeal in the Supreme Court of the Territory of Hawaii (Rec. p. 38). When all else has failed, an attack upon the charge against him seems to be the last hope of the convicted.

But when a defendant has been accorded a fair trial and the charge is attacked upon appeal for the first time as an afterthought, the rule to be applied is stated in 24 C.J.S., title Criminal Law, 275, Section 1671 as follows:

"An indictment questioned for the first time on appeal, however, must be held sufficient, unless so defective that by no construction can it be said to charge the offense for which accused was convicted."

Thus as stated by the Court in *Muench v. United States*, (C.C.A. 8th) 96 Fed. (2nd) 332 at 335:

“Where the indictment is questioned for the first time on appeal, it will ordinarily be held sufficient, unless so defective that by no reasonable construction can it be said to charge the offense for which the defendants were convicted.”

2. Objections Not Presented In The Trial Court Are Not Reviewable Upon Appeal.

The record discloses that after his trial in the District Court of Honolulu, Appellant appealed to the First Circuit Court, pleaded not guilty and was accorded a new trial. The record further shows that no objection was ever made to the charge against him during the course of two trials. Under such circumstances objections not presented to the trial court and properly preserved, are not available on review.

As stated in *Tong Kai v. Territory*, 15 Haw. 612 at 613:

“None of these objections were raised until after verdict and must be deemed to have been waived.”

As stated in 24 C.J.S., title Criminal Law, 350, Section 1690:

“Exceptions cannot be taken or raised for the first time upon appeal.”

Accord:

Territory v. Chong, 36 Haw. 537 at 540

Territory v. Yoon, 36 Haw. 550 at 552

Moreover, any defect apparent on the face of a charge must be taken by demurrer or motion to quash "before the accused has pleaded and not afterwards."

Revised Laws of Hawaii 1945, Section 10819
(Set forth in Appendix)

3. The Record Fails To Disclose The Nature Of The Charge Of Which Appellant Was Convicted.

The Appellant in this appeal seeks to challenge the sufficiency of the charge of which he was convicted. But the record in this case is incomplete. It fails to show the precise charge of which Appellant was tried and convicted. Undoubtedly this was due to the fact that the charge was not attacked until appeal, and then merely as an afterthought.

The Supreme Court of Hawaii took cognizance of the incomplete state of Appellant's record. Thus it stated (Rec. p. 32):

"At the outset it must be noted that the defendant did not include or describe the assailed charges in his assignments and that the record does not disclose them. Hence his assignments, dealing exclusively with their form and substance, are incomplete and present no precise point of law."

If the record before the Supreme Court of Hawaii did not reveal the nature of the charge, a fortiori, the record before this Court does not reveal it.

The Appellant, however, adopts the theory, upon appeal, that the charge against him is contained in a portion of the "Notice and Certificate of Appeal" of the District Magistrate, which reads, inter alia, as follows (Rec. p. 52; Aplt.'s Br. p. 3):

“NOTICE AND CERTIFICATE OF APPEAL

I hereby Certify that on the 16th day of July, 1943 in the above entitled cause, I found the above named defendant guilty of violating the following charge, to wit:

That Koa Gora, at Honolulu, City and County of Honolulu, Territory of Hawaii, on the 6th day of July, A.D., 1943, did do that which was lewd and lascivious in conduct, contrary to Section 6253 of the Revised Laws of Hawaii, 1935, and I sentenced him to imprisonment in Honolulu Jail for a period of 6 months (six). Costs of Court remitted. . . .”

But even if it be assumed, *arguendo*, that the charge in the District Court of Honolulu was the same as that contained in the magistrate’s “Notice and Certificate of Appeal” nevertheless the record wholly fails to show the nature of the charge upon which the Appellant was tried in the First Circuit Court of Hawaii.

When the Appellant appealed from the judgment of conviction before the District Magistrate he obtained a trial *de novo* in the Circuit Court of Hawaii, yet the record in this case does not reveal the nature of the Circuit Court charge, which the Appellant seeks to attack on this appeal (Rec. p. 32).

Therefore, in view of the wholly incomplete state of the record now before this Court, the sufficiency of the charge of which Appellant was convicted in the Circuit Court of Hawaii, is moot.

Fukunaga v. Territory (C.C.A. 9th) 33 Fed.
(2nd) 397

Equitable Life Ass. Co. v. Brown, 187 U.S. 308,
311, 47 L. Ed. 190, 192

4. **Arguendo, The Purported Charge Of The District Court Was Sufficient.**

Assuming for the purpose of argument, however, that the sufficiency of the charge had been raised in the trial court and thereafter duly preserved for review and, further that the charge in the Circuit Court of Hawaii was the same or in similar language as that which Appellant now claims was the charge before the District Magistrate—all of which fails to find support in the record—nevertheless an examination of such contention will show that it is without merit. (The foregoing was also assumed in the Supreme Court of Hawaii, Rec. p. 32).

It should be noted at the outset, however, that it may be somewhat of a violent assumption to assume that the words contained in the "Notice and Certificate of Appeal" were even the same as the original charge in the District Court because under the usual practice in the District Court of Hawaii the charge is entered orally.

Territory v. Burum, 34 Haw. 75 at 77

Territory v. Sing Kee, 14 Haw. 586 at 587-588

Rep. of Haw. v. Kanalo, 11 Haw. 435 at 438

Thus whether the original charge in the District Court was entered orally, and if so, the difference, if any, between it and the words contained in the "Notice and Certificate of Appeal" does not appear.

Under similar circumstances it was stated in *Territory v. Sing Kee*, supra, 14 Haw. 586 at 587-588:

"The charge itself is, under the practice prevailing in the District Courts, entered orally by the prosecuting officer upon the defendant's appearance and noted by the magistrate in his record, and it is upon the charge as thus entered that the trial is had. The precise form of the charge entered against this defendant in the District Court of Koloa, is not disclosed by the record before us, nor does it appear that any objection was made on the ground of its insufficiency, although the defendant was present and represented by counsel. We cannot assume, under these circumstances, that the charge as entered did not state an offense."

Irrespective of the foregoing, however, it will now be assumed, for the purposes of argument, that the charge upon which Appellant was tried in the District Court of Honolulu was exactly the same as that contained in "Notice and Certificate of Appeal." It will further be assumed, arguendo, that the charge in the Circuit Court of Honolulu was also the same.

However, even assuming the foregoing, and despite the fact that during the course of two trials, in the courts below, no objection was ever made to the charge against him, nevertheless examination of the authorities shows that the charge was entirely sufficient.

Thus the purported charge identified and named the defendant; the venue was stated; the date of the offense was specified; the particular offense with which the Appellant was charged was set forth, namely, that

the Appellant, Koa Gora, “. . . did do that which was lewd and lascivious in conduct . . .” and then the particular statute with which Appellant was charged was given.

The charge set forth all of the essential elements of the offense. It was sufficient in the absence of a timely objection in the court below.

But the Appellant claims, upon this appeal, that the purported accusation was “vague” and “indefinite” (Aplt.’s Br. p. 6). The Appellant also says that at best, the form of accusation would force him to trial not “knowing what defense to prepare” (Aplt.’s Br. p. 7).

The foregoing argument by Appellant would have held merit if it had been made at any time during the course of the two trials in the courts below. If Appellant had actually desired additional information in order to prepare his defense he would certainly have been entitled to have both trial courts consider such a request. But Appellant never once during the two trials claimed, as he does upon this appeal, that he needed additional facts to prepare his defense. If Appellant had really desired additional facts to prepare his defense the time to have made this known was in the two trial courts not after verdict in an Appellate Court.

Regarding the sufficiency of a charge attacked for the first time upon appeal, it was stated in *Coates v.*

United States, (C.C.A. 9th) 59 Fed. (2nd) 173 at 174:

"After verdict, every intendment must be indulged in support of the indictment."

In 42 C.J.S., title Indictments and Informations, 1344, Section 312, the rule is stated as follows:

"Construction of pleading after verdict. Objections to the sufficiency of an indictment or information made after trial and verdict do not receive the same favorable consideration as similar objections made before arraignment and plea. After verdict every presumption and inference is in favor of the verdict, and, although the rules requiring that accused must be apprised of the charge against him cannot be relaxed altogether, a reasonable degree of latitude is allowed in the construction of the pleadings of the prosecution. Hence, an indictment is construed most strongly in favor of the state, and against accused; every intendment must be indulged in its support, and no objection can prevail if no prejudice appears."

Since the purported charge set forth all the essential elements of the offense and, as the Appellant did not ask for a bill of particulars he cannot now complain that the charge is couched only in general terms.

Thus as stated in *Johnson v. United States* (C.C.A. 9th) 59 Fed. (2nd) 42 at 44, certiorari denied 53 S. Ct. 83, 287 U.S. 631, 77 L. Ed. 547:

"In regard to appellant's complaint that the charges in the indictment are couched 'only in general terms' it is to be observed that the appellant asked for no bill of particulars."

If Appellant's present argument, that the purported charge is "vague" and "indefinite," had been urged in the trial court, the trial judge, in his discretion, would have been warranted in granting a motion for a bill of particulars.

But where the objection is voiced for the first time on appeal, the rule to be applied, under the settled law of the Territory, is as stated by the Supreme Court of Hawaii (Rec. p. 38):

"Further, assuming *arguendo* that the defendant was entitled to more particularity, that right is deemed to have been waived and therefore he cannot be heard, after plea and conviction upon substantial evidence of guilt, to assert it for the first time on appeal, the record conclusively showing that the defendant not only took no advantage of any statutory procedure provided for his benefit but also proceeded through the entire period of trial without objecting to the charges in the lower court or calling their alleged insufficiencies in any way to the attention of the trial judge or prosecuting attorney."

And the purported charge which the Appellant attacks is not for a serious felony. On the contrary it involves merely a misdemeanor.

Furthermore, the purported charge which Appellant seeks to attack upon this appeal did not originate in a court of record, where formal indictments with explicit language are normally employed. What Appellant attacks is the alleged District Court charge. Under the laws of the Territory of Hawaii it is well

settled that a District Court charge does not have to be as particular as an indictment.

Thus as stated in *Republic of Hawaii v. Parsons*, 10 Haw. 601 at 603:

“The same degree of particularity is not required in a charge in a district court as is required in a formal indictment . . .”

Accord:

Rex. v. Gillingham, 2 Haw. 750

Thus as noted *supra*, under the usual practice in the District Court, the charge is entered orally.

The Appellant recognizes the general rule that an indictment or information for a misdemeanor in the words of the statute is sufficient (Aplt.’s Br. p. 7).

And, that the foregoing is the rule, there can be no question. As stated in *Cannon v. United States* 29 L. Ed. 561 at 569, 116 U.S. 55 at 78:

“In *United States v. Mills*, 7 Pet. 138, 142 (32 U.S. Bk. 8, L. Ed. 636, 637), it was said by this court: ‘The general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute.’

And the purported charge in the present case set forth the offense in the words of the statute. Consequently, it was sufficient.

Appellant does not specify what particular information he deems to be missing from the alleged charge. The argument advanced in Appellant’s Brief is con-

fined to generalities. Appellant simply says the charge did not inform him of the "specific accusatory circumstances." Presumably, Appellant means by these words that the charge did not give the "details" of the lascivious conduct (Aplt.'s Br. p. 6).

It is doubtful if Appellant can be serious in making such a contention. When a defendant is arraigned upon a charge of lasciviousness in the public courtroom, he, more than any other, desires brevity in the charge. Especially so if such defendant is endowed with a sense of modesty and decency.

But under the position taken by the Appellant, the alleged charge should have stated:

"That the defendant, Koa Gora, did unbutton the trousers of the said Arthur A. Notikai and said defendant, Koa Gora, did remove and take into his hands and hold the penis of the said Arthur A. Notikai, et cetera."

However, even though this Appellant may have wished to have the lascivious acts or conduct set forth in the charge—which is questionable—nevertheless the courts refuse to allow their records to be polluted by giving the details of such lurid and obscene matters.

As stated in *People v. Carey*, (Mich.) 187 N.W. 261 at 262, quoting *People v. Girardin*, 1 Mich. 90:

"Courts never allow its records to be polluted by bawdy and obscene matters."

Thus, in this type of case the charge, properly, should not set forth the details of the lasciviousness.

The authority cited by Appellant points out the reason for the rule very well (Aplt.'s Br. p. 7). Thus as stated in 27 American Jurisprudence, title Indictments and Informations, 664, Section 103:

"But there are cases to which the rules just stated do not apply. Thus, in some courts an indictment or information charging the accused with an offense of a vile and degrading nature, particularization of the details of which would be offensive to decency, may be charged in the general words of the statute, even though they may not be sufficiently specific to inform him of the exact act or acts which constitute the offense. These rules do not set up impracticable or impossible standards of particularization."

Moreover, the charge never need set forth the evidence upon which the government intends to rely. As stated in *Territory v. Yoshimura*, 35 Haw. 324 at 332:

"The right of an accused to be fully informed of the nature of the charge against him relates, so far as the information is concerned, solely to the charge and not the evidence in support thereof . . .

"The state is not required to plead the evidence relied upon to prove the acts alleged to have been committed by the defendant . . ."

The purported charge in this case employed the words of the statute. This was sufficient. It was wholly unnecessary to set forth the lascivious acts committed by the Appellant.

As stated in *People v. Carey*, supra, 187 N.W. 261 at 262:

" . . . The information in the language of the statute informed defendant of the crime for which he was to be tried. It should not state the evidence by which it is to be proved, nor should it describe the particular act charged. The gross indecency of the subject forbids it."

As further stated by the court in the Carey case (187 N.W. at 262):

"The information followed the language of the statute (section 15511, Comp. Laws 1915):

'That any male person who in public or private commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be deemed guilty of a felony and upon conviction thereof be punished, etc.

—but it did not give the particulars of any act of gross indecency, and the term is not defined by the statute."

(*Emphasis ours*).

In the Carey case, the defendant throughout the trial by timely objection—contrary to the Appellant in this case—sought his discharge on the ground that he was not charged with any offense known to the law.

In overruling that contention, the court held the "gross indecency" of the subject forbids the "statute" as well as the "information" from setting forth any description of the lascivious act charged. The information in the language of the statute was held sufficient regardless of the fact that the statute did not define the term or give any particulars of the offense.

But the Appellant also contends that the statute in question (formerly Section 6253, Revised Laws of Hawaii 1935; now Section 11673, Revised Laws of Hawaii 1945; set forth in Appendix) is unconstitutional because, as he claims, the legislature did not attempt to define what is meant by the term "lascivious conduct." Appellant therefore says that since the alleged charge did not specify the nature of his "lascivious conduct" and as the term is not defined by statute "all must speculate as to the meaning of the phrase" (Aplt.'s Br. pp. 12, 4, and 9-13).

Appellant's attack upon the constitutionality of the statute—like his attack upon the purported charge—was also made as an afterthought for the first time upon appeal. Assuming *arguendo*, however, that the statute may now be questioned, nevertheless it will be seen that the Appellant's argument is wholly without merit.

The Appellant says the legislature should have defined what was meant by the term "lascivious conduct." That it is not necessary for the legislature to define the term "lascivious conduct" is well settled. In fact, statutes dealing with lasciviousness do not attempt to define the term. And the reason is stated in 8 Ruling Case Law 347, Section 380 as follows:

"Statutes making open and gross lewdness a crime do not attempt to define what constitutes the crime, and because of the nature of the subject the courts have refrained from going beyond the immediate needs of the case in hand. The common sense of the community as well as the sense of de-

cency, propriety and morality, which most people entertain, is sufficient to apply those statutes to each particular case and point out what particular conduct is rendered criminal by them.”

Also see:

31 Corpus Juris, title Indictments & Informations, 718, Sec. 268, Note 33

Thus in the case of *State v. Burgess*, (Maine) 123 A. 178, the defendant was charged as follows:

“ ‘Ernest Burgess, of said Oakland, in said county, on the 2d day of August, 1923, at said Oakland, was a person wanton and lascivious in speech and behavior, against the peace of the state and contrary to the statute in such case made and provided.’ ”

To this charge the defendant, at the very outset of the case and in due time—which differentiates it from the case at bar, where in spite of two trials no objection was ever made—demurred to the charge upon the ground that it was not sufficient since the words and acts which constituted the alleged wantonness and lasciviousness were not specifically set forth.

The statute under which the charge was brought merely stated (123 A. at 178) that “wanton and lascivious persons in speech, conduct or behavior” should be punished.

In overruling the defendant’s contention that the acts of lasciviousness should be specifically set forth the court stated (123 A. 178):

“Such is not the rule of pleading in this class of offenses, where it is the common practice and not

the particular words or acts which constitute the crime alleged.

"It may and doubtless does become necessary to prove the doing of particular acts and the utterances of certain words of a wanton and lascivious nature in order to make out the statutory offense, but these are merely evidence of the general charge, and need not be alleged in the complaint. *Commonwealth v. Pray*, 13 Pick. (Mass.) 359. Or as well expressed in a headnote in *State v. Collins*, 48 Me. 217:

" 'When an offense consists of a series of acts, or a habit of life, the indictment may charge the offense in general terms, and the particular acts which establish the guilt of the party need not be stated.' "

Thus the court in the Burgess case held the charge in the language of the statute sufficient regardless of the fact that the statute did not attempt to define the offense.

In *People v. Ring*, (Mich.) 255 N.W. 373 at 375, the court stated:

"It is not necessary that the crime itself be particularly well defined. The average jury, composed of members of the community, has an instinctive realization of what constitutes a violation of the act. Instinctive modesty, human decency, and natural self-respect require that the private parts of persons be customarily kept covered . . ."

Said the court in *State v. Millard* 18 Vt. 574, 46 Amer. Dec. 170:

"The statute, R.S. 444, Sec. 8, provides that if any man or woman, married or unmarried, shall be guilty of open and gross lewdness or lascivious behavior, etc., he shall be . . . (punished). No particular definition is given, by the statute, of what constitutes this crime. The indelicacy of the subject forbids it, and does not require the court to state what particular conduct will constitute the offense. The common sense of the community as well as the sense of decency, propriety, and morality, which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it."

And as appears from the decision (46 Amer. Dec. at p. 171) the indictment ". . . followed the words of the statute . . ." in that case, and as noted above, that statute, (as the statute in the case at bar) gave no definition of what constituted the crime.

In *People v. Kratz*, 230 Mich. 334, 203 N.W. 114, the defendant appealed from a conviction for indecent exposure claiming that the information was not sufficient to charge any offense. The defendant duly preserved exceptions throughout the trial of the case upon the theory that the information was not sufficient since it merely charged the offense in the words of the statute.

The statute in that case provided (203 N.W. 114):

" 'If any man or woman, married or unmarried, . . . shall designedly make any open and indecent or obscene exposure of his or her person, . . . every such person shall be punished by imprisonment in the county jail,' etc."

The information in the Kratz case provided (203 N.W. 114) that the defendant did, "... then and there designedly make an open, indecent and obscene exposure of his person in the presence of Margaret Leversay, Lucille Leversay and Alice Jones, contrary to the form of the statute in such cases made and provided . . ."

In holding that the information was sufficient in the Kratz case the court stated:

"As a general rule, it is held sufficient to charge the offense in the language of the statute, although in a certain class of cases it has been held not sufficient. This belongs to that class of cases of which it was said in *State v. Millard*, 18 Vt. 577, 46 Amer. Dec. 170 . . .:

"'No particular definition is given, by the statute, of what constitutes this crime. The indelicacy of the subject forbids it, and does not require of the court to state what particular conduct will constitute the offense. The common sense of the community, as well as the sense of decency, propriety and morality, which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it.'" (p. 114.)

In *State v. Schumacher* (Iowa '23) 191 N.W. 870, the indictment charged, in substance, that the defendant committed lewd and lascivious acts upon the body of a certain child. The defendant noted exceptions and appealed claiming that the facts constituting the crime should have been set out and that the indictment merely asserted a conclusion of law.

In overruling this contention, the court stated (191 N.W. 870):

"The indictment . . . is substantially in the language of the statute, and is sufficient . . ."

As stated in *State v. Vliet* (N.J.) 197 A. 894 at 895, by the court in considering the sufficiency of an indictment for lewdness:

"The indictment follows the language of the statute. This is sufficient. *Graves v. State*, 45 N.J.L. 203; *State v. Cohen*, 108 N.J.L. 216, 157 A. 437."

For the same reason—because the indecency of the subject forbids it—indictments for serious felonies such as sodomy, in the language of the statute, have been held sufficient even though the statute made no attempt to define the crime.

Said the court in *Borden v. State* (Okla. 1927) 252 Pac. 446-447:

"The statute gives no definition of the crime which the law with due regard to the sentiments of decent humanity has always treated as one not fit to be named."

". . . An indictment or information, charging the commission of the crime against nature, in the language of the statute is sufficient."

Thus it was stated by the court in *State v. Langelier*, (Maine) 8 A. (2nd) 897, at 897:

"It has frequently been held that it is sufficient merely to charge the accused with the commission of the crime of 'sodomy,' or of 'the crime against nature,' the crime being . . . too disgusting to re-

quire other definition or further details or description. Wharton's *Crim. Pro.*, 10th ed., V. 2, Secs. 1234 and 1243; 8 R.C.L. 335."

In *Glover v. State*, 179 Ind. 459, 101 N.E. 629 at 630, the indictment merely charged that the defendant had committed the crime of sodomy. The defendant appealed claiming a statement of the facts constituting the offense should have been given. The basis of the defendant's claim was similar to that in the case at bar. Thus it was contended: ". . . that where an offense is defined by statute in generic terms, without naming the particular acts constituting it, . . . it is not sufficient to charge it in the language of the definition, but the particular acts must be stated which constitute the offense denounced."

In overruling the foregoing claim set up by the defendant, the court stated (101 N.E. at 630):

"But by reason of the vile and degrading nature of this crime, it has always been an exception to the strict rules requiring great particularity and nice certainty in criminal pleading, both at common law and where crimes are wholly statutory. It has never been the usual practice to describe the particular manner or the details of the commission of the act, and, where the offense is statutory, a statement of it in the language of the statute, or so plainly that its nature may be easily understood, is all that is required. Coke, 3 Inst. 59; 12 Coke's Rep. 37; 2 Chitty, Cr. Law, 50; Crown, Cir. Comp. 86; 4 Blackstone, 215, 216; 20 Encyc. of Pl. & Pr. 274; 36 Cyc. 503; 1 Whart. Cr. Law (11th Ed.) Sec. 760; *People v. Williams* (1881) 59 Cal. 397; *Davis v. State* (1810) 3 Har. & J. (Md.) 154; *Lambert-*

son v. People (1861) 5 Parker, Cr. R. (N.Y.) 200; *Com. v. Dill* (1894) 160 Mass. 536, 36 N.E. 472; *State v. Romans* (1899) 21 Wash. 284, 57 Pac. 819; *Bradford v. State* (1893) 104 Ala. 68, 16 South 107, 53 Am. St. Rep. 24; *State v. Williams* (1882) 34 La. Ann. 87; *Honselman v. People* (1897) 168 Ill. 172, 48 N.E. 304; *Kelly v. People* (1901) 192 Ill. 119, 61 N.E. 425, 85 Am. St. Rep. 323; *State v. Whitmarsh* (1910) 26 S.D. 426, 128 N.W. 580.”

Again in *Connell v. State*, (Ind.) 19 N.E. (2nd) 267 at 268, the defendant claimed that the indictment for sodomy in the language of the statute was not sufficient. But the court overruled the claim and approved its holding in *Glover v. State*, *supra*, saying that much of the testimony in the case was “too vile and obscene to be recorded in the reports of this court.”

Thus in Hawaii, Section 11681, Revised Laws of Hawaii 1945 (set forth in the Appendix) does not attempt to give any of the particulars of, nor to define what shall constitute the crime of sodomy. Neither are the details ever set forth in an indictment.

Thus in *Territory v. Chee Siu*, 25 Haw. 814, 817-818, an indictment for the serious felony of sodomy—as contrasted with merely the misdemeanor in the present case—was held sufficient even though it gave no more information than the alleged District Court charge in the present case.

5. The Lascivious Conduct Does Not Have To Be Public Under The Hawaiian Statute.

Appellant says that at common law the “offense of ‘lascivious conduct’ had to be ‘openly and publicly

committed.' ” (Aplt.’s Br. p. 12.) It is not clear from this statement whether Appellant means to infer that the act must also be public under the Hawaiian Statute. However, reference to the statute (set forth in Appendix) shows that there is no requirement that the act be public. And where the statute does not by its terms require the act to be public, a lascivious act in private or in only one person’s presence is sufficient.

Commonwealth v. Wardell, 128 Mass. 52, 35 Amer. Rep. 357, is one of the leading cases on this point.

In that case the defendant was charged with “open” and “gross” lewdness and lascivious behavior. The evidence showed the defendant had exposed his person to a girl eleven years old in her home. The defendant appealed claiming that there was no proof of “open” lewdness within the meaning of the statute.

Said the court (35 Amer. Rep. at 359):

“ . . . at common law, . . . the offense charged must always amount to a common nuisance committed in a public place and seen by persons lawfully in that place. The word ‘lewdness’ at common law means open and public indecency; but as used and qualified in the statute it has a broader sense. It was held to mean, as used in other criminal statutes (Gen. Stat., chap. 165, Sec. 13; chap. 87, Sec. 6), ‘the irregular indulgence of lust, whether public or private.’ *Commonwealth v. Lambert*, 12 Allen 177. See also, *Commonwealth v. Parker*, 4 id. 313. The statute punishes, not public, but open lewdness. The word ‘open’ qualifies the intention of the perpetrator of the act; it does not fairly imply that it must be public, in the sense of being in a public

place, or in the presence of many people. The offense created does not depend on the number present. It is enough if it be an intentional act of lewd exposure, offensive to one or more persons present."

Even though the statute in that case required the lascivious acts to be "open and gross," which is to be contrasted with the statute in the present case, the court nevertheless held that the statute did not mean "open" in the common law sense of "public." Consequently, lascivious conduct in the presence of one person only was held sufficient.

In referring to such statutes it is stated in 8 Ruling Case Law 348, Sec. 380:

"The word 'lewdness' as used and qualified in statutes, has, . . . a broader sense, and to constitute an offense of open and gross lewdness under statute it is not necessary that the act of which complaint is made should have been committed in a public place . . . The offense created does not depend on the number present, but it is enough if it be an intentional act of lewd exposure, offensive to one or more persons present. To hold otherwise would be to hold that one might commit with impunity any act of indecency however gross, before any number of individuals successively."

Accord:

33 Amer. Juris. title Lewness, 16, Sec. 2

Thus in *State v. Juneau* (Wis.) 24 L.R.A. 857, the defendant was convicted of open and gross lewdness for indecently exposing his person to a child four years of age. The defendant appealed claiming that

secret lascivious conduct was not an offense. In overruling this contention the court stated (24 L.R.A.):

"The offense may be committed by the intentional act of exposing one's person indecently in the presence of one person, to whom it is offensive, as well as in the presence of many persons. It could not change the quality of the act that it was committed in the presence of a child of tender years,—too innocent to be offended by it. The benignity of the law would neither presume or permit the consent of such a child to such an act." (p. 859.)

In *State v. Millard*, supra, 18 Vt. 574, 48 Amer. Dec. 170, it was held that exposure by a man of his private parts to one woman only with solicitation of intercourse constituted ". . . open and gross lewdness and lascivious behavior."

In overruling the defendant's contention that a public exposure was necessary the court stated (46 Amer. Dec. at p. 171):

"The crime can not be made to depend on the number of persons, to whom a person thus exposes himself, whether one, or many."

Thus it will be seen from the foregoing cases that even in those states where the statutes have required that the lascivious conduct be "open and gross," nevertheless the courts have eliminated the strict common law requirement that the act be "public."

Under the Hawaiian statute—which has been on the statute books for many years unchanged, except as to penalty—there is no requirement that the lascivious conduct even be "open or gross." Therefore, a

fortiori, is the Appellant's contention in the present case that the act must be "public" more obviously unsound.

The cases and authorities cited by Appellant in his brief are not applicable to the law and facts involved in the present case.

Under the many authorities cited herein, as well as the great weight of authority, a different rule necessarily applies to charges involving lascivious or obscene matters, and as to these cases an indictment—even for a serious felony as contrasted with merely the misdemeanor in the present case—in the language of the statute is sufficient. The indelicacy of the subject prohibits particularization.

Therefore, in spite of the fact that the record upon appeal wholly fails to reveal the nature of charge of which Appellant was convicted and now seeks to attack, and even if it be assumed *arguendo*, that the charge in the Circuit Court of Hawaii was the same or in similar language to that which Appellant now claims was the charge in the District Court and, further assuming *arguendo*, that the sufficiency of the charge had been raised in the lower court and thereafter preserved for review, nevertheless under the holding of the well considered cases and authorities cited herein it is clear that in lascivious cases the statute as well as the charge properly should not describe what constitutes such act of lasciviousness. Its indecency forbids it. The word "lascivious" has a well understood meaning in the courts and the community. And the courts have refused to allow their records to be polluted by any descriptions of such lasciviousness.

CONCLUSION

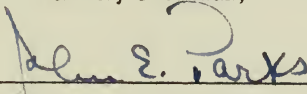
It is respectfully submitted that the errors assigned are without merit and that the judgment appealed from should be affirmed.

Dated at Honolulu, T. H., this 23rd day of June, A. D. 1945.

Respectfully submitted,

W. Z. FAIRBANKS,
Public Prosecutor
of the City and County of Honolulu,
Territory of Hawaii,

By


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Attorneys for Appellee.

Receipt of three copies of the foregoing brief is acknowledged this _____ day of June 1945.

E. J. BOTTS,
Attorney for Appellant.

Appendix.

Appendix

Section 11673, Revised Laws of Hawaii 1945.

Lascivious conduct, etc.; penalty. Any man or woman who is guilty of lewd conversation, lascivious conduct, or libidinous solicitations, shall be punished by imprisonment of not more than one year or by a fine of not exceeding one thousand dollars, or by both such imprisonment and fine. (P.C. 1869, c. 13, s. 8; R. L. 1925, s. 4447; R. L. 1935, s. 6253; am. L. 1941, c. 88, s. 1.)

Section 11681, Revised Laws of Hawaii 1945.

Sodomy defined; penalty. Whoever commits sodomy, that is, the crime against nature, either with mankind or any beast, shall be punished by a fine not exceeding one thousand dollars, and by imprisonment at hard labor not more than twenty years. (P. C. 1869, c. 13, s. 11; R. L. 1925, s. 4446; R. L. 1935, s. 6261.)

Section 10819, Revised Laws of Hawaii 1945.

Demurrer, motion to quash. Every objection to any indictment for any defect apparent on the face thereof, shall be taken by demurrer or motion to quash the indictment before the accused has pleaded and not afterwards; and every court before which any such objection shall be taken for the defect may, if it be thought necessary, cause the indictment to be forthwith amended in that particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no

motion in arrest of judgment shall be allowed for any defect in any indictment which might have been taken advantage of by demurrer or motion to quash as aforesaid. (L. 1876, c. 40, s. 33; R. L. 1925, s. 4068; R. L. 1935, s. 5517.)